84-857

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL LOSS CONTROL SERVICE CORPORATION,

PETITIONER

V.

BILLY CANIPE,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

Walter W. Thompson
Post Office Box 848
Clarksdale, Mississippi 38614
(601) 627-9601

133P

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
QUESTIONS PRESENTED FOR REVIEW	1.
LIST OF ALL PARTIES	3.
CITATIONS TO OPINIONS BELOW	5.
STATEMENT OF JURISDICTIONAL GROUNDS	5.
STATUTES AND REGULATIONS	7.
STATEMENT OF THE CASE	9.
ARGUMENT	20.
CERTIFICATE	58.
PROOF OF SERVICE - AFFIDAVIT	59.
APPENDIX	60.

TABLE OF AUTHORITIES

I. CASES PAGE

Bazdar vs. Koppers Company, Inc.
(N. D. OH, 1981)
524 F. Supp. 1194..... 44

Byrd vs. Fieldcrest Mills,
496 F. 2d 1323
(Fourth Circuit, 1974).....34

Cochran vs. International Harvester
Company (W.D. KY, 1975)
408 F. Supp. 598..... 44

Craighead vs. United States
(Tenth Circuit, 1970)
423 F. 2d 1288..... 47

Davis vs. United States
(D. C. Neb., 1975)
395 F. Supp. 793, Affirmed
(C. A. Eighth Neb. 536 F. 2d 758). 46

Otto vs. Specialties, Inc.

(N. D. Miss., 1974)

386 F. Supp. 1240.....41, 44

Russell vs. Bartley, 494 F. 2d 334

(Sixth Circuit, 1974).....35, 38,

40, 42

Secretary of Labor vs. Grayson

Lumber Company, Inc.

OSAHRC Docket No. 793, p. 14,

1973, 1 OSHC 1234.....50, 51

Skidmore vs. Travelers Insurance

Company (Fifth Circuit, 1973)

483 F 2d. 267.....24, 28,

29, 30,

31, 34,

42

II. STATUTES

29 C.F.R. Section 1910.....8, 49

Occupational Safety and Health Act of 1970, Section 2 et seq., 29 U.S. C.A. Section 651-678 et seq.....7, 25, 32, 33, 36, 39, 41

United States Congressional and Administrative News, 1970, p. 5177.....27, 33

(a) QUESTIONS PRESENTED FOR REVIEW:

National Loss Control Service Corporation, hereinafter "National Loss", is a national corporation engaged in a business of helping other companies improve work place safety. During the applicable period of this case, National Loss had entered into an agreement with Kraft, Inc. to provide safety inspections and related accident prevention services at various Kraft plants throughout the country. In September of 1979, National Loss inspectors conducted a thorough four (4) day search of the Kraft Plant in Memphis, Tennessee, concentrating on detecting violations of OSHA regulations. In January 31, 1980, Respondent, Billy Canipe, was injured while cleaning a flake roll machine while it was still running. Canipe filed suit against National Loss on the theory that National

Loss, in its inspection of the Kraft Plant, negligently failed to find certain violations of OSHA regulations related to the automatic flake roll machine, and to have Kraft correct these violations, which failure resulted in Plaintiff's injury.

The United States District Court for the Northern District of Mississippi, Honorable William C. Keady, granted Summary Judgment on behalf of National Loss on the ground that National Loss violated no duty owed to Canipe.

The United States Court of Appeals for the Fifth Circuit, reversed the District Court holding in essence that National Loss could be held liable for failing to detect the OSHA violations of Kraft.

Thus, the question presented for review in this Petition for Certiorari is whether, under the facts and circum-

stances of this case, National Loss may be liable for Kraft's violation of OSHA regulations, contrary to language of the Occupational Safety and Health Act of 1970, contrary to cases from The United States Court of Appeals for the Sixth Circuit, as well as prior cases of the United States Court of Appeals for the Fifth Circuit and other cases from other circuits throughout the nation? Petitioner submits that a clarification of the effects, if any, of the statutes and regulations and rules of the Occupational Safety and Health Act of 1970 upon private civil litigation against non-employers is of paramount importance!

(b) A LIST OF ALL PARTIES:

All parties appear in the caption of the case; however, it should be noted that Petitioner National Loss Control Service Corporation, is a

subsidiary of Kemper Insurance Companies, which includes the following:

(1) Lumbermen's Mutual Insurance Company;

(2) American Motorists Insurance Company;

(3) American Manufacturers Mutual Insurance Company;

(4) American Protection Insurance Company;

(5) National Loss Control Service Corporation; and

(6) Federal Kemper Insurance Company.

(c) CITATIONS TO OPINIONS BELOW:

The relevant opinions on this Appeal are the following:

(1) The opinion of the United States District Court for the Northern District of Mississippi, Honorable William C. Keady, District Judge, granting Petitioner's Motion for Summary Judgment, being Canipe vs. National Loss Control Service Corporation, 566 F. Supp. 521 (N.D. Miss. 1983) and the opinion of the United States Court of Appeals for the Fifth Circuit reversing the District Court's Opinion, being Canipe vs. National Loss Control Service Corporation, (Fifth Circuit, 1984) 736 F. 2d 1055.)

(d) STATEMENT OF JURISDICTIONAL GROUNDS:

The cause of action herein was originally filed by Plaintiff, Canipe, against Defendant, National Loss, in the

United States District Court for the Northern District of Mississippi, based on diversity of citizenship between the parties. However, the United States Court of Appeals for the Fifth Circuit entered its Judgment on July 23, 1984, reversing the Summary Judgment granted by the United States District Court for the Northern District of Mississippi, on the grounds that allegations of negligence for failure to detect OSHA violations could be the basis for a cause of action against National Loss. The United States Court of Appeals for the Fifth Circuit subsequently denied the Petition for Rehearing of National Loss on August 24, 1984. Thus, Petitioner, National Loss, prosecutes this Appeal for an interpretation of the conditions or circumstances, if any, upon which the standards of the Occupational Safety and Health Administration may be used as a basis

of or evidence in a cause of action against a non-employer party. Therefore, this is a highly significant issue involving interpretation of United Statutes and Regulations, and the rulings of the Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require the granting of this Writ. Thus this appeal falls within the jurisdiction of this Court for review on appeal.

(e) THE APPLICABLE STATUTES AND REGULATIONS:

The specific statutes concerned herein are the Occupational Safety and Health Act of 1970, Section 2 et seq., 29 U.S.C.A. Section 651-678, especially Section 653 (b)(4) of the Act which provides that:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any

Workmen's Compensation Law or to enlarge or diminish or affect in any manner common law or statutory rights, duties or liabilities of employers and employees under any law of respect to injuries, diseases or death of employees arising out of or in the course of, employment."

The specific regulation involved herein is 29 C.F.R. Section 1910.212 which states:

"(a) Machine Guarding -
(1) Types of guarding.
One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, in-going nick-points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier guards, two-hand tripping devices, electronic safety devises, etc.

(b) General requirements are machine guards.
Guards shall be affixed in the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible."

In addition, reference will be

made to other portions of the Occupational Safety and Health Administration Act, the regulations of the Occupational Safety and Health Administration, Congressional hearings and other opinions in an effort to obtain the intent and proper interpretation of the above statutes as related to the matter at bar.

(f) STATEMENT OF THE CASE:

Canipe was and is an adult resident citizen of Memphis, Shelby County, Tennessee. National Loss is a corporation chartered under the laws of the State of Illinois, but was and is qualified and registered to do business in both the states of Tennessee and Mississippi.

National Loss is a national corporation engaged in the business of helping other companies improve work place safety. On November 9, 1978,

National Loss entered into an "Agreement for Services" with Kraft wherein National Loss was to provide "...Loss Control Services, on a request basis as approved and initiated by Kraft's directors of safety and security or other authorized employees." This contract commenced on January 1, 1979, and terminated on January 1, 1980. Subsequently on January 11, 1980, National Loss and Kraft entered into another modified agreement effective January 1, 1980, and ending December 31, 1980. The contract between the two parties, national in scope, was intended to establish only the general framework for National Loss' provision of services to the various Kraft Plants around the country. The primary purpose of this contract, therefore, was to set the hourly rates for the various services that National Loss could provide to

Kraft Plants. The service to be performed at a particular plant was to be determined "...on a request basis as approved and initiated by Kraft's directors of safety and security or other authorized employees." Under the arrangement between National Loss and Kraft Plant in Memphis, Tennessee, National Loss was requested to make quarterly physical hazard surveys and loss experience analyses. These services consisted of two basic functions:

(1) Analysis of previous accidents of the plant in order to determine loss patterns for concentrated study; and

(2) Walk-through inspections to determine physical hazards by observing the physical layout condition of the plant. Loss analysis is an attempt, after injuries occur, to determine the cause and likelihood of recurrence. Walk-through

inspection is a procedure whereby the inspectors walk through the general traffic pattern of the plant and observe any physical hazards that might be readily observable or within a reasonable distance of the inspectors. These were the only type of services requested by Kraft for quarterly inspections. Kraft never requested NATLSCO to perform a job safety analysis of any employee position; neither did it request an inspection of the plant's operating practices or procedures. Only if an inspector fortuitously observed an unsafe practice or procedure would Kraft expect National Loss to investigate and bring the unsafe practice to the attention of Kraft's management in the form of a recommended change.

Further, as part of its own ongoing safety program, Kraft had a monthly safety inspection made by its

own people, published its own handbook titled "Kraft's Minimum Safety Standards For Industrial Field Division" as well as a plant safety rules and procedures handbook which was given to all employees, including Canipe.

Again, NATLSCO was never requested, pursuant to the contract, to perform an investigation or survey of any kind of procedures, including the clean-out procedures of the automatic flake roll machine. The automatic flake roll machine was used to change liquid fat and chemicals into a flaky type chemical. Since it was an automatic machine, Canipe's primary function as an assistant operator was to run a single product until that product run was completed. Then Canipe was to clean the machine and prepare it to run whatever product was next scheduled. If there was no product change-over during his particular shift, then he might not

clean the machine during his shift at all. At other times, he might clean it one time or at most twice during his shift. It would almost be a matter of chance if someone walking through the facility would see the automatic flake roll machine being cleaned out.

There was no evidence that anyone from National Loss ever observed any clean-out procedure of the automatic flake roll machine; especially there is no evidence that an automatic flake roll machine was kept running while being cleaned. Again, National Loss was never requested to inspect the clean-out procedure of the automatic flake roll machine.

At approximately 5:00 a.m. on January 31, 1980, just prior to switching products, Canipe caught his shirt sleeve on a large pin at the end of the auger, which pulled him into the machine and

amputated his right arm.

Since there had never been a previous accident involving the flake roll machines, no loss experience analysis was ever performed prior to that time. More importantly, according to Kraft's own managers, Kraft never relinquished its responsibility for maintaining a safe work environment to National Loss. Kraft, with its own personnel, maintained an on-going safety program. The head of this safety program was Jack Hansen, Corporate Safety Director for Kraft, whose responsibility it was to prepare and implement practices and procedures for the safety program of all Kraft employees, including those of the Kraft Plant in Memphis, Tennessee. Mr. Hansen was and is a professional safety engineer, who has taught and lectured on safety engineering at the University

level and has been an expert witness with respect to safety engineering. Mr. Hansen was in the position of Corporate Safety Director for Kraft in January of 1980. At the same time, Kraft also employed Allen Jamison as a personnel and safety administrator specifically in charge of the Kraft Plant in Memphis, Tennessee, to be an assistant to Jack Hansen. With respect to the Kraft Plant in Memphis, Tennessee, Hansen and Jamison were the corporate officers who would have made requests to National Loss for specific types of safety inspections during the term of the contract agreement between National Loss and Kraft.

On July 5, 1979, Jack Hansen of Kraft noted in the National Safety News published February, 1977, that OSHA's definition of what constituted a serious violation had become stricter and carried

more severe penalities. Based on this, Jack Hansen sent a memo to all of Kraft's safety managers in the United States requesting that they survey Kraft's locations for possible OSHA violations under these new guidelines. As a result, on July 10, 1979, Allen Jamison requested National Loss during a third quarter visit to concentrate on an OSHA type inspection and to note the violations and make the recommendations accordingly. Thus, during the days of September 11, 12, 13 and 14, 1979, National Loss conducted the requested, simulated OSHA survey of the Kraft Plant in Memphis, Tennessee. The report to Kraft from that survey covered some 44 pages of recommendations and conclusions.

Shortly thereafter, on October 29, 1979, Tennessee OSHA made an inspection of the Plant. Tennessee OSHA

cited two violations, none of which had any connection with the automatic flake roll machine in any manner.

Then, on January 31, 1980, Plaintiff had his accident in which he lost his arm. On February 12, 1980, after the injury to Canipe, Tennessee OSHA returned because of the accident and cited Kraft under a "catch-all general duty violation" on the automatic flake roll machine. Kraft was not cited for any "physical hazard violations". In July of 1980, the Kraft Plant in Memphis, Tennessee, was sold to another company called Whitco so that the September 1979, inspection was the last made of the Kraft Plant in Memphis, Tennessee, by National Loss.

Based on the foregoing facts, the United States District Court for the Northern District of Mississippi granted

Summary Judgment in favor of National Loss holding that National Loss had breached no duty owed to Canipe under Tennessee negligence law. Plaintiff Canipe appealed the District Court's ruling. The United States Court of Appeals for the Fifth Circuit reversed, holding that Canipe had"...pointed to evidence in the record that negligence by National Loss in its inspection for physical hazards and OSHA violations proximately caused his injury." The evidence the Fifth Circuit relied on was an affidavit from a Safety Engineer who examined the plant and machines in question in 1983, two years after the plant with the flake roll machines had been sold by Kraft. This Safety Engineer claimed to have found a number of physical hazards related to the automatic flake roll machines which constituted violations

of OSHA regulations. Thus, the Fifth Circuit determined such was grounds to find that National Loss might have failed to find physical hazards which constituted OSHA violations that proximately caused Plaintiff's injuries and thus reversed the District Court.

On Petition for Rehearing, National Loss attempted to argue to the Court of Appeals that its holding amounted to allowing a private civil cause of action against the non-employer third party based upon alleged violation of OSHA standards, contrary to the intent of Congress in enacting the Occupational Safety and Health Act of 1970 and the many cases deciding this very issue. Accordingly, given the magnitude of the case, National Loss seeks this Writ of Certerori.

(g) ARGUMENTS:

OSHA VIOLATIONS AND THIRD PARTIES

The Court of Appeals for the Fifth Circuit held in essence that if National Loss negligently failed to observe violations of OSHA standards by Kraft at Kraft's Memphis Plant, and if such negligence is considered the proximate cause of the injury sustained by Canipe, then National Loss would be liable for failing to detect such violations of OSHA regulations! In reaching this incredible conclusion, the Court of Appeals apparently ignored a number of legal and factual roadblocks, each of which Petitioner will discuss in detail.

Apparently, the Court of Appeals is of the opinion that National Loss had an absolute duty under its contract with Kraft to check every single OSHA violation in the Kraft Plant! Petitioner does not know how the Court of Appeals arrived at this decision since there is absolutely

no evidence that such a duty was ever imposed upon National Loss when considering the intention of either party based on the language of the contract. Indeed, to the contrary, when Tennessee OSHA inspected the Kraft Plant less than two months later, Tennessee OSHA cited Kraft for two violations, none of which had any connection with the automatic flake roll machine in any manner. Yet, it would seem that if National Loss had an absolute duty to detect every single OSHA violation in the Kraft Plant, then Kraft should have, under its contract with National Loss, required National Loss to pay Kraft's fines to Tennessee OSHA. This did not occur because National Loss did not have a contractual duty to protect every single OSHA violation in the Kraft Plant! Yet, the Fifth Circuit must necessarily be holding that National Loss owes an absolute

duty, not only to Kraft, but also to Canipe, to detect every single OSHA violation; otherwise, how can it be said that a failure to detect a violation constitutes a breach of duty owed to Canipe through Kraft, which proximately caused Canipe's injury!

Perhaps recognizing the difficulty in this argument, the Fifth Circuit then moved in mysterious ways its conclusions to reach. That is, the Fifth Circuit holds that "...a jury could legitmately infer that Kraft delegated to National Loss its duty to identify OSHA violations at the Humko Plant, and that Kraft relied on National Loss to identify OSHA violations at that plant." (id at 1064). The difficulty with such a conclusion by the Fifth Circuit is that it is contrary to the express intent of the act and interpretations of the act

prior to this time. In particular, a very important case with regard to the issue of delegation and reliance is Skidmore vs. Travelers Insurance Company (Fifth Circuit, 1973)483 F. 2d 267, in which the Fifth Circuit held:

> "The complaint in this case rests on the theory that the Occupational Safety and Health Act of 1970, U.S.C. Sections 651-678, carries an implied private remedy against executive officers of an employer guilty of violating the Act. For the reasons stated in the opinion of the District Court we hold that the Act does not create such an implied remedy. See 356 F. Suppl. 670". id at 67.

The Skidmore case was a suit by an employee against the executive officers of an employer seeking recovery of civil damages for the employer's failure to comply with the Occupational Safety and Health Act. In its opinion, the District Judge held:

"While the statute imposes a duty on employers, and enforces that duty by criminal sanctions and by creating a right to injunctive relief, it does not mention any private civil remedy against the employer for damages suffered by an employee as a result of the violation of the Act. Ordered to review and brief its legislative history, counsel has been unable to indicate to the Court any material in the statute's legislative course tending to create the slightest implication that Congress intended to create a duty to respond to the individual employee in damages.

The Act indicates a contrary intention, neither to limit nor to expand the duty of employers; for 29 U.S.C.A. Section 653(b)(4), recites:

'Nothing in this chapter shall be construed to supersede or in any manner affect any Workmen's Compensation Law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of or in the course of, employment.'

While courts have sometimes

divined an implicit right to damages from a statute creating a duty expressly enforced in some other way, and this Court itself reached a similar result with respect to the Fair Labor Standards Act, civil liability does not necessarily or inevitably result from the violation of a statutory duty made enforceable in some other manner... id at 671.

But we may pretermit the issue of the employer's liability, for this suit seeks to assert the individual liability of executive officers. The Act in terms applies only to "employers". Nothing in it purports to impose any duty on any employees of an employer, executive or otherwise.

No case has been cited stretching an implication to this degree. Imposition of a duty on an employer does not create liability for performance of that duty on officers or other employees of the employer.

The Senate Report that accompanied the bill to the floor for passage provided that the purpose of the bill was to "reduce the number and severity of work related injuries and illnesses, which despite current efforts of employers and government, are resulting in ever increasing human misery and economic loss."

United States Congressional and Administrative News, 1970, Page 5177. From the very wording of the statute and all of the legislative reports, it is clear that OSHA applies only to "employers".

The statute provides the duty of the employer shall be to provide for safe job sites by furnishing places of employment free from recognized hazards that might cause death or serious harm to employees. Neither statutory provision nor legislative history has been cited to support the chimerical proposition that Congress intended either to create a duty on other employees of the same employer (even though they are executives) or to give injured workers a private civil remedy against other employees, albeit executives.

Absent precedent for such an interpretation with respect to any other statute, absent any language in OSHA even remotely susceptible of construction as creating a civil cause of action against executive officers, and absent even a title of legislative history to justify such an interpretation, the notion that OSHA creates a right must be rejected. Hence the motion to dismiss is granted." (Emphasis added)(E.D. LA.1973, 356 F.Supp. 670 at 671-2.)"

Applying the Skidmore case to the case at bar, the most important point is that Skidmore held that an employee could not maintain an action against a non-employer (even executives of the employer) in spite of the fact that such executives had been delegated the responsibility for performing the employer's duty of maintaining the work place in accordance with the regulations of OSHA. Further, it can't be denied that the employee in that case would certainly have relied upon these executives. Yet, in spite of the strength of the factors of delegation and reliance in the Skidmore case, both the District Court and the Fifth Circuit specifically ruled that such a cause of action could not be maintained. Now, in the case at bar, the Fifth Circuit is apparently changing that ruling without specifically overruling Skidmore or any of

the cases following Skidmore. That is, in the case at bar, the Fifth Circuit is holding that Canipe can maintain a cause of action against National Loss on the basis that Kraft delegated to National Loss part of its duties for maintaining a work environment free of OSHA violations. This is a direct contradiction to the holding in Skidmore. Further, the evidence including Plaintiff's own testimony in deposition, clearly shows that the plaintiff did not rely upon National Loss to make certain that Kraft complied with OSHA standards. Thus, Canipe's action against National Loss is even less tenuous than the employee's action against executives of the company in Skidmore. In Skidmore, there was at least a delegation to and reliance on the executives officers by the employer as opposed to the situation in the case at

bar, where there is nothing in the agreement between National Loss and Kraft that Kraft had ever delegated any responsibility for safety to National Loss. Indeed, to the contrary, testimony by personnel from both Kraft and National Loss shows that there was no intention by either of the parties to delegate responsibility for safety from Kraft to National Loss. Further, as a practical matter, the Skidmore case implies that an employer cannot delegate its OSHA responsibilities to another. To allow such delegation would certainly alter the intent of OSHA in placing the responsibility for maintaining the work place in accordance with OSHA standards solely upon the employer. Further, if Kraft had intended to delegate responsibility for compliance of OSHA standards to National Loss, then necessarily Kraft would have also had to delegate to

National Loss some authority for making changes. Instead, the clear evidence is that all National Loss had the authority to do was to make recommendations upon which Kraft could then act or not act as Kraft saw fit. Thus, there was no discretionary authority on the part of National Loss to make any changes to affect the plant - only to provide recommendations, which cannot be considered to have been a delegation of responsibilities. Therefore, clearly, under the Skidmore case and its progeny, there is no cause of action under OSHA against National Loss.

The subsequent case of Jeter vs. St. Regis Paper Company, 507 F. 2d 973 (Fifth Circuit, 1975), concerned an action brought by an employee of an independent painting contractor against St. Regis Paper Company, the owner of a

chemical silo, for injuries sustained when the employee fell from a scaffold while painting the silo. With respect to the claim that OSHA created a federal cause of action, the Fifth Circuit there held:

> "Assuming without deciding that St. Regis may have violated requirements of OSHA regulations promulgated thereunder by the Secretary of Labor, we affirm the trial court's charge and hold that no cause of action for such violations can be implied under OSHA to run in favor of a person who was not an employee of the violator against whom the recovery is sought.
>
> The Occupational Safety and Health Act of 1970 imposes a duty on employers and provides for enforcement of that duty by criminal sanctions, civil penalties recoverable by the United States for deposit into the Treasurey of the United States and, under certain circumstances, injunction of the violation of the duty by a district court, acting upon application of the Secretary of Labor. See 29 U.S.C.A. Sections 662, 666. Congress

has set up a comprehensive system for the promulgation and enforcement of regulations and standards under OSHA. Nowhere in the language of the Act, in its legislative history, or in the statutory declaration of purpose and policy in the Act itself is there the slightest implication that Congress considered OSHA creating a private right of action for violation of its terms. See 1970 U. S. Code Congressional and Administrative News, Pages 5177-5241; 29 U.S.C.A. Section 651. The only provision in the statute which addresses itself to a private remedy clearly indicates that Congress did not intend OSHA to create a new action for damages in favor of employees. Section 653(b)(4) of the Act provides that

'Nothing in this chapter shall be construed to supersede or in any manner affect any Workmen's Compensation Law or to enlarge or diminish or affect in any manner common law or statutory rights, duties or liabilities of employers and employees under any law of respect to injuries and employees under any law of respect to injuries, diseases or death of employees arising out of or in the course of, employment.'

It seems clear that Congress did

not intend OSHA to create a new private cause of action, but, on the contrary, intended private rights to be unaffected thereby.

The provisions for enforcement of OSHA and the regulations promulgated thereunder are sufficiently comprehensive to make such a private right of action unnecessary to effectuate the congressional policy underpinning the substantine provisions of the statute. (Citations Omitted)

We have been unable to find a single case wherein a Court has found such a private right of action created by OSHA. Although the results are not yet conclusive as to the litigation of private claims formed by this relatively new act, the Courts so far have been unanimous in their rejection of contingent similiar to the one made by Jeter. This Court has previously rejected any private right by an employee against the executive officers of the employer. Skidmore vs. Travelers Insurance Company, 356 Supp. 670 (E.D. La.), affirmed, 483 F. 2d 67 (Fifth Circuit). The Fourth Circuit has refused to imply an action against the employer itself, where State Workmen's Compensation was the exclusive remedy of the injured party. Byrd vs. Fieldcrest Mills, 496 F. 2d 1323 (Fourth Circuit, 1974). The Sixth Circuit has

> refused an employee-against-employer action, as well as an action by the employee against the supervising engineer, who was not his employer. Russell vs. Bartley, 494 F. 2d 334 (Sixth Circuit, 1974). See also Hare vs. Federal Compress and Warehouse Company, 359 F. Supp. 214 (N. D. Miss. 1973); Dekle vs. Todd, 132 Ga. App. 156, 207 S. E. 2d 654 (1974).
>
> Although the facts here do not call upon us to decide definitively whether OSHA may create a private right of action by an employee against his employer, we perceive no base upon which to posit a claim on behalf of Jeter, a non-employee, against St. Regis. St. Regis owes no duty to Jeter under OSHA. There being no duty, there can be no breach. The district court was correct in not submitting this theory of action to the jury." id at 996-997 (Emphasis added).

It is of further noteworthy interest that in the Jeter case, the plaintiff claimed that St. Regis was negligent in the performance of its safety engineering responsibilities. The Fifth Circuit also noted that the evidence does not

support such a charge.

Next, also in the Fifth Circuit, came the case of Melerine vs. Avondale Shipyards, Inc. (Fifth Circuit, 1981) 659 F. 2d 706, in which an employee of an independent contractor engaged to outfit a ship sued the employer of a crane operator for injuries sustained when the contractor's employee was aiding the crane operator in making a lift. In Melerine, the Fifth Circuit specifically held:

> "In a negligence action, regulations promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651-678 (1976) ("OSHA"), provide evidence of the standard of care exacted of employers but they neither create an implied cause of action nor establish negligence per se. While they are evidence of a general standard of care due employees, they establish no standard of care due third persons. Therefore, in this negligence action, we reject the argument that the failure a third party that was not the plaintiff's employer to follow OSHA regulations as establishing that third party's negligence. Because we accept the trial judge's conclusion based on the

> other claims of negligence and because there are no other factual disputes, we affirm the judgment denying recovery." (Emphasis added) id at 707.

Interestingly, in the Melerine case, the defendant was actively involved in the activities which directly caused injury to the plaintiff, that is, moving the crane boom. On the other hand, in the case at bar, National Loss was not involved in any activity which directly led to the injury to Canipe. Yet, the Fifth Circuit held in Melerine that OSHA standards could not be used to complain of alleged negligence of a third party; whereas, in the case at bar, the Fifth Circuit, without specifically saying so, seems to overturn or reverse Melerine by saying that National Loss, a third party, can be held responsible for Kraft's violation of OSHA regulations. National Loss submits that on this basis alone, the opinion of

this panel of the Fifth Circuit should be reversed and summary judgment granted by the District Court affirmed.

Additionally, as can be seen from the Jeter case, not only is the Fifth Circuit split within itself, it is also at odds with a number of other cases that were cited in the Jeter case. The opinion of the Fifth Circuit is contrary to the Sixth Circuit case of Russell vs. Bartley (Sixth Circuit 1974) 494 F. 2d 334 which, if Tennessee law is to be applied, would be the proper authority to look to insofar as its interpretation of OSHA regulations as applied to a third party is concerned. In this event the Russell case becomes very important. In Russell the plaintiff was injured in the course and scope of his employment with the Bartley and Bart partnerships, allegedly as a result of failure of his employer to comply with

provisions of OSHA. Subsequently, plaintiff filed an Amended Complaint bringing Howard K. Bell, Consulting Engineers, Inc. (Bell) in the suit as an additional defendant. Bell had acted as a supervising engineer and designed the plans and specifications on the project in which claimant was injured. Plaintiff alleged that Bell's negligence was a joint concurring cause of the injury. In denying plaintiff's cause of action, the Sixth Circuit stated:

> "However, nowhere in the statute or in the record of the debate on the Act in Congress is there any mention of a private civil remedy against anyone for damages suffered by an employee because of a violation of the Act (id at 335)...With respect to Bartley and Barton, there is no legislative history or case law to support appellant's proposition that OSHA created a private civil remedy and the clear language of Section 653(b)(4) of the Act specifically evidences

Congressional intention to the contrary." id at 335-336.

Clearly the United States Court of Appeals for the Sixth Circuit is of the opinion that OSHA standards or regulations cannot be the basis for a cause of action against a third party not responsible for implementing those regulations. That is, in the Russell case, Bell was an engineer who designed the project and was therefore concerned with safety engineering, but he was not responsible for implementing the safety regulations for plaintiff's employer and thus could not be responsible for the plaintiff's injury. A similiar situation exists in the case at bar in that National Loss was hired only to do a pre-OSHA inspection, and was not expected to implement any procedures to correct any violations of OSHA discovered.

At this point, petitioner would submit that no better analysis of the cases

and statutes concerning the rights and actions under OSHA has been made than the decision of Judge Keady, the District Court below, in the case of Otto vs. Specialties, Inc., (N.D. Miss. 1974) 386 F. Supp. 1240, in which the Court held:

> "The avowed purpose of OSHA, as stated in the initial section of the Act, is to 'assure so far as possible every working man and woman in the nation safe and healthful working conditions...' 29 U. S. C. Section 651(b). In achieving this goal, OSHA mandates the promulgation of the safety and health standards by the Secretary of Labor which have the force of law. See 29 U. S. C. Sections 654, 655. Violation of the standard is punishable by specified criminal and civil penalties of considerable severity. 29 U. S. C. Section 666. Nowhere in the Act or in its legislative history can be found any indication that Congress intended to allow additional civil actions instituted by aggrieved employees injured through violations of OSHA standards. Indeed, Section 29 U. S. C. Sections 653(b)(4) strongly implies that Congress intended

no such remedy should be made available...

Although the recent passage of this legislation militates against the existence of a large body of case law on this subject, several cases do shed substantial light on our question. In each, the Court found that Congress intended not to create, and did not create, any civil cause of action for violations of OSHA regulations. (The Court goes on to discuss the cases of Skidmore vs. Travelers, supra, Hare vs. Federal Warehouse and Compress Company, 359 F. Supp. 214(N.D. Miss. 1973), and Russell vs. Bartlett, Supra) id at 1242 ...

Further, Mississippi's Negligence Law is well-developed and available for Otto's use. No useful purpose related to Congressional policy goals would be served by tacking on yet another enforcement vehicle. We thus conclude that OSHA permits no civil actions for damages for remedy alleged violations of OSHA safety standards. id at 1243.....

Otto's alternative contention, that violation of OSHA standards may be taken into account in this action as evidence under Mississippi negligence law, involves more subtle considerations of federalism. For although it

is clear that Specialties is correct in its major premise, i.e., that no federal civil remedies can be had by a private litigant under OSHA, the effect of OSHA on the Mississippi common law of torts is another more perplexing matter...

In ruling on this common law aspect of Specialities motion, we apply Mississippi law in the manner in which we believe it would be applied by the courts of that state. We are thus placed in the position of prophesying the effect the Supreme Court of Mississippi would choose to give to the federal decisions construing the Occupational Safety and Health Act. In applying a common law doctrine justified by a judicial desire to assist the Legislature in achieving its policy goals, how is a state court affected by determinations by the federal courts that a particular congressional scheme needs and desires no judicial assistance of this type? id at 1244...

We believe the Supreme Court of Mississippi, if faced with this question, would recognize as we do, that what is at stake here is a question of judicial buttressing of legislative goals. We believe that with this recognition would come a realization that, before the judiciary undertakes to

> supplement legislatively designed sanctions, it should first inquire whether any supplementation was foreseen or is needed. Such an inquiry into OSHA has been made by the federal courts, which have concluded that no private civil remedy is needed to fulfill the goal established by Congress in its adoption of the statutes. That this determination was made in the context of a federal civil remedy and not within the framework of the negligent per se doctine is to us irrevelant, since both concepts share a common raison d'etre - a judicial addition to statutory penalities thought to be inadequate to the purposes the legislative branch sought to promote.
>
> We concede that the Mississippi Courts need not be bound in this matter by the federal determination of OSHA's purpose and effect. We believe, however, that the Supreme Court of Mississipi would be persuaded by the logic of those opinions to refuse to permit the utilization of OSHA safety standards in this case, either as conclusive proof or evidence of negligence by Specialities." id at 1244-1245.

This position taken in the Otto case was subsequently fortified by the Opinion of the Fifth Circuit in Melerine, supra. It is apparently only the opinion

by this particular panel of the Fifth Circuit Court of Appeals, which cites no authority for its position, that so radically departs from the concensus of other courts which have considered this issue.

It is for this reason that the petitioner feels it absolutely necessary to have clarification of this issue by the Supreme Court of the United States in order to avoid further disagreement among Circuit Courts of Appeal of the United States on this Issue! Other cases speaking to this issue which support the petitioner's position in this case are: Cochran vs. International Harvester Company, (W.D. KY, 1975) 408 F, Supp. 598; Johnson vs. Koppers Company, Inc. (N. D. OH, 1981) 524 F, Supp. 1182; Bazdar Vs. Koppers Company, Inc. (N. D. OH, 1981) 524 F. Supp. 1194.

Another important result of the Opinion of the Fifth Circuit in this cause would be to make U. S. Government Inspectors of OSHA also liable for their negligent failure to find violations of OSHA regulations which later cause injury to employees. In the case at bar, as noted, after the September 1979 inspection by employees of National Loss, OSHA made an inspection of the plant in October and also failed to find the violation relied upon by plaintiff. Under the Opinion by the Fifth Circuit in this case, it would appear that the OSHA inspectors could also be held liable for negligent inspections!! Yet, every authority on this issue has held that the government inspectors could not be liable. (See Davis vs. United States, (D. C. Neb. 1975) 395 F. Supp. 793, Affirmed (C. A. Eighth Neb. 536 F. 2d 758;

Fisher vs. United States (Third Circuit, 1971) 441 F 2d 1288; Craighead vs. United States (Tenth Circuit, 1970) 423 F. 2d 664; Jeffries vs. United States (Ninth Circuit, 1973) 477 F. 2d 52.

If OSHA inspectors who inspected the Kraft Plant after inspection by National Loss cannot be held liable for negligent inspection, then certainly National Loss should not be held liable for negligent inspection under their contract with Kraft. That is, National Loss' contract with Kraft did not require National Loss do anything more than what was expected of an OSHA inspector. Since OSHA did not find any violations in its October inspection related to the automatic flake roll machine, then, to that extent, National Loss certainly performed its part of the contract. And since there were no breach of duty by National Loss under its contract

with Kraft, there can be no breach of any alleged duty owed to Canipe.

Finally, National Loss shows that the violations of OSHA regulations that plaintiff claimed National Loss failed to detect were not "violations" at all. In particular, the primary alleged violation was that there was a hinged dust cover on the automatic flake roll machine which could be opened to allow access to the machine and that there were no warning signs on the machine. Accepting these facts, the question is whether these facts, as a matter of law, constituted violations of OSHA safety standards. In order to more fully evaluate this issue, it is important to recall that this was an "automatic" flake roll machine which did not require an operator to manually operate the machine so that there were no hazards created at the point of

operation. Thus, there was no need for an operator to lift the dust cover for access to the machine while the goods were being processed. Indeed, the Fifth Circuit states as much in its Opinion finding that Canipe only needed to gain access to the machine whenever production of that machine shifted from one product to another in order to clean the machine. Therefore, it is clear that the Fifth Circuit's reliance on 29 C. F. R. Section 1910.212 simply does not apply to this machine since there were no hazards created by any "point of operation, in-going nick points, rotating parts, flying chips and sparks" while the chemicals are being processed. Therefore, the only real issue is whether there needs to be a "permanently" affixed guard when maintenance is being performed in order to comply with OSHA standards. It should first be noted that

Section 1910.212 does not require that the guards be "permanently" affixed to the machine even where "affixed" guards are required. But more importantly, OSHA standards do not require any guards under 1910.212 where only maintenance operations are to be performed. As support for this position, National Loss cites the case of Secretary of Labor vs. Grayson Lumber Company, Inc., OSAHRC Docket No. 793, P 14, 1973, 1 OSHC 1234. In Grayson an issue was raised as to whether a mechanical apparatus should have been guarded under Section 1910,219. The Commission held:

> "According to Item 12 of the Citation, violation of 29 CFR 1910.219 existed because respondent had not guarded an exposed mechanical transmission apparatus. The evidence is that such apparatus was unguarded, but the only employees affected thereby are maintenance personnel while performing maintenance duties on the apparatus. According to the compliance officer,

> respondent should erect guard rails to thereby abate the alleged violations. Were we to accept this proposition then we must necessarily conclude that maintenance operations could not be performed on the apparatus. We did not conceive the standards to be so broad. Accordingly, vacation is proper period." Id. at 1235 (Emphasis Added).

Applying the Grayson case to the case at bar, if the dust cover or any guard were permanently affixed to the machine, so that it could not be removed, then as in Grayson, Canipe could not have performed his job of cleaning out the machine or doing other maintenance work on it. Therefore, reasonably, some method such as "hinges" or other means, was necessary to allow Canipe access to the machine for purposes of cleaning and maintenance. Clearly, under the Grayson case, a dust cover is not a violation of OSHA standards, particularly given the automatic nature of this machine.

Similiarly, warning signs were not required under the OSHA regulations either. Indeed, the only real violation of OSHA standards in this case are the violations of the "General Duty Cause" by Kraft for allegedly failing to properly instruct Canipe as to written procedures or methods to be used during the cleaning of the auger. These are procedural violations and as the Fifth Circuit noted, only physical hazard violations are an issue here.

As further support for the position taken by National Loss, it is very important to note again that Tennessee OSHA inspected this plant on October 20, 1979, approximately one month after the inspection by National Loss which was approximately three (3) months before Canipe's accident and found no violations related to the automatic flake roll machine.

EVEN MORE IMPORTANTLY, SUBSEQUENT TO CANIPE'S INJURY, ON FEBRUARY 12, 1980,

TENNESSEE OSHA MADE ANOTHER INSPECTION SPECIFICALLY TARGETING THE AUTOMATIC FLAKE ROLL MACHINE. IN THAT INSPECTION, THE ONLY VIOLATIONS FOUND BY TENNESSEE OSHA WAS THE GENERAL DUTY VIOLATION BASED ON THE FOLLOWING GROUNDS:

A. Written procedures or methods to be used during the cleaning of the auger machine system on five (5) flaking machines were not provided. The machines were located in the warehouse packaging area.

B. Employees were not trained in safe procedures or methods to be used during the cleaning of the auger systems on the flaking machines located in the warehouse packaging area. (See Exhibits, pages 81; Exhibits "8" and "9").

According to Jack Hansen, Kraft's in-house safety engineer, the automatic flake roll machine in question did not come under OSHA standards since it was "an automatic

machine". Therefore, if Mr. Hansen did not consider that the automatic flake roll machine fell under OSHA standards, Kraft certainly would not have requested National Loss to inspect the machines for physical hazards or for procedural hazards in a pre-OSHA inspection. Moreover, given the fact that the two (2) OSHA inspections, the inspections by National Loss and Kraft's own safety engineer all conclude that there were no physical hazard associated with the automatic flake roll machine or the injury to Canipe, the undisputed facts and the law simply fail to support claimant's allegations. Again, this is a question of undisputed facts applied to the standards of OSHA, and OSHA itself found no "physical hazards" violations within one (1) month after injury to the plaintiff.

With respect to the location of the on-off switches and the emergency

switch-off violations claimed by plaintiff, petitioner submits that OSHA merely requires "identification of disconnecting means of motors and appliances". That is, OSHA only requires identification of switches as to their function. OSHA does not require the switches be located within a certain distance from the machine it controls. Also, since the machine here involved was an automatic machine, it would not required by OSHA that the machine have an emergency switch-off. More importantly, on page 21 of their 44 page General Recommendations, National Loss noted that ..."a number of disconnect breaker switches and power disconnect boxes were not clearly marked as to their function." Thus, National Loss fulfilled its duty by recommending these switches be marked as to function in order to avoid a physical hazard OSHA violation.

Therefore, National Loss submits that it did everything it contracted to do in advising Kraft as to any violations of OSHA standards with respect to physical hazards, including Kraft's failure to identify the function of electrical switches. Kraft's failure to subsequently carry out National Loss' recommendation, certainly cannot make National Loss responsible!

In conclusion, National Loss reiterates that the Court of Appeals for the Fifth Circuit erred in allowing Canipe to maintain a cause of action based on violations of OSHA regulations, even when all prior authorities who have spoken to this issue have said that no such claims can be made against third parties. In addition, the undisputed facts show that the alleged OSHA violation the plaintiff claims National Loss failed

to detect were not OSHA violations at all and cannot be the basis for this cause of action.

Finally, it is earnestly submitted that the proximate cause of injuries to Canipe was the improper procedure used by him in cleaning out the automatic flake roll machine. National Loss had no obligation to inspect or make recommendations as to procedures in this pre-OSHA inspection and it is unquestionable that National Loss never observed any cleaning or maintenance procedures being performed. This is fully supported by the inspection of Tennessee OSHA in citing Kraft for violation of the procedural failures one month after the accident.

WHEREFORE, PREMISES CONSIDERED, petitioner, National Loss, respectfully requests the Court to reverse the Judgment of the United States Court of

Appeal for the Fifth Circuit and to affirm the Summary Judgment of the District Court entered herein.

Respectfully submitted,

WALTER W. THOMPSON
ATTORNEY FOR PETITIONER
P. O. BOX 848
CLARKSDALE, MISSISSIPPI 38614
(601) 627-9601

CERTIFICATE

THIS IS TO CERTIFY that I, Walter W. Thompson, have this day personally delivered, a true and correct copy of the above and foregoing Petition for Certiorari to the Honorable John H. Cocke, one of the attorneys for Respondent at his business office at 30 Delta Avenue, Clarksdale, Mississippi 38614.

This the 22nd day of November, 1984.

WALTER W. THOMPSON

PROOF OF SERVICE - AFFIDAVIT

Subscribed and sworn to before me, at Clarksdale, Coahoma County, Mississippi, this 22nd day of November, 1984.

Notary Public

My Commission Expires:

5-15-85

APPENDIX

PAGE

1. Opinion of the Court of Appeals for the Fifth Circuit dated July 23, 1984, Canipe v. National Loss Control Service Corporation (Fifth Cir. 1984) 736 F. 2d 1055..... APP 1

2. Order of the Court of Appeals for the Fifth Circuit dated August 24, 1984, denying Petition for Rehearing filed by Petitioner herein.....APP 35-A

3. Memorandum Opinion dated May 27, 1983, of the United States District Court for the Northern District of Mississippi granting Summary Judgment for Petitioner herein.....APP 35

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

BILLY CANIPE PLAINTIFF-APPELLANT

VERSUS

NATIONAL LOSS CONTROL
SERVICE CORPORATION DEFENDANT-APPELLEE

736 F. 2d 1055

JULY 23, 1984

Appeal from the United States District Court for the Northern District of Mississippi.

Before, WISDOM, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

WISDOM, Circuit Judge:

This diversity action involves the application of the principles of section 324A of the American Law Institute's Restatement (Second) of Torts, (1965) to a tort case subject to Tennessee law. Section 324A deals with the liability of an actor, rendering services to one person, for failure to exercise reasonable care to protect a third person.

Billy Canipe sues to recover for a severe personal injury that he sustained at work. The defendant, National Loss Control Service Corporation (Nation Loss), had

contracted with the plaintiff's employer (Kraft, Inc.) to provide safety inspections and related accident-prevention services at the plant in which the plaintiff worked. Canipe alleges that the defendant performed its contractual duties negligently, and that this negligence was a proximate cause of the plaintiff's injury. After a long period of discovery, the district court ruled that the plaintiff had presented no genuine issue of material fact, and therefore granted the defendant's motion for summary judgment. Canipe v. National Loss Control Service Corp., N.D. Miss. 1983, 566 F. Supp. 521. Because of the thoroughness and thoughtfulness of the district court's opinion, we are hesitant to overturn the court's decision. Nevertheless, we have concluded that the decision rests upon an erroneous legal premise. Accordingly, we affirm in part, reverse in part, and remand.

I.

Summary judgment is appropriate, of course, only when the movant has demonstrated the lack of any genuine issue of material fact. In reviewing a grant of summary judgment for the defendant, we must examine the record in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor. See, e.g., Gulf Mississippi Marine Corp. v. George Engine Co., 5 Cir. 1983, 697 F. 2d 668, 670-71. Viewed from that perspective, the facts of this case are as follows.

The defendant is a national corporation engaged in the business of helping other companies improve workplace safety. National Loss entered into its contractual relationship with Kraft in January 1978.[1]

1. The contracts between Kraft and National Loss were each for a one-year term. The parties renewed their original agreement, without substantial modification, every year between 1978 and 1982.

The contract between these two parties was national in scope and was intended to establish only the general framework for National Loss's provision of services to the various Kraft plants around the country. The primary purpose of this contract, therefore, was to set the hourly rates for the various services that National Loss could provide to Kraft plants. The service to be performed at a particular plant was to be determined on a "by request" basis. Under the arrangement between National Loss and Kraft's Humko[2] plant in Memphis, Tennessee, National Loss agreed to conduct quarterly safety inspections of the plant and to provide the plant management with loss experience analyses.[3] Humko plant

2. Humko Products is a divison of Kraft.

3. Loss experience analyses are retrospective analyses of previous accidents. The objective of these analyses is to identify safety problems by noting statistical trends in, for example, the locations or types of injuries experienced at the plant.

management, in addition to contracting for these services, conducted its own periodic safety inspections of the plant.

On July 5, 1979, Kraft's Corporate Safety Manager, Jack Hansen, sent the following memorandum to all of Kraft's safety managers:

> "Attached for your information is a copy of an OSHA-Gram from the National Safety News. It explains the change in OSHA's position on defining a serious violation. This new definition will probably result in our locations receviing more serious violations and higher penalties. Obviously, the answer is to survey all of our respective locations to make sure that the locations do not have any OSHA violations."

On July 10, Allen Jamison, who was the Kraft official in charge of coordinating safety inspections at the Humko plant, wrote to the National Loss manager of the Kraft account. That letter states in pertinent part:

> "In reference to Jack Hansen's memo of July 5, 1979[,] explaining the change in OSHA's position on defining a serious violation, I would like to request that your Loss Control people during their third quarter visit concentrate more on an OSHA type inspection, and if any serious violations are observed, to include them in the recommendation section. The third quarter is the only quarter that we would like the format changed."

During their next visit to the Humko plant, which occurred in September 1979, the National Loss inspectors conducted a thorough four-day search of the plant, concentrating on detecting violations of OSHA regulations. The two inspectors later sent plant management a detailed, forty-four page report on the violations they had discovered.

Canipe worked at the Humko plant as Assistant Operator of two machines known as "flake roll machines", which are capable of producing different types of flaky chemical products. As a part of his duties,

he was required to clean each machine whenever production on that machine shifted from one product to another. To clean the machine, he had to lift a transparent plastic dust cover and then use an air hose to force out of the machine's auger trough any matter remaining in the trough. Canipe contends that he was taught a method of cleaning the machine while the auger was in motion. On January 31, 1980, while cleaning one of the machines in this manner, Canipe caught his shirt sleeve on a large pin at the end of the auger. He was pulled into the machine and his right arm was amputated.

Canipe sued National Loss on November 20, 1981. He based his primary theory of recovery upon section 324A of the Restatement (Second) of Torts (1965) which states:

"One who undertakes, gratuitously or

for consideration, to render services to another which should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical him resulting from his failure to exercise reasonable care to protect his undertaking if

"(a) his failure to exercise reasonable care increases the risk of such harm, or

"(b) he has undertaken to perform a duty owed by the other to the third person, or

"(c) the harm is suffered because of reliance by the other or the third person upon the undertaking."[4]

On April 28, 1983, the district court granted the defendant's motion for summary judgment on the ground that Tennessee law did not recognize the applicability of

---

4. Canipe also seeks to recover based on the alleged breach by National Loss of the contract between it and Kraft. Canipe's argument here is that he was a third-party beneficiary of this contract. The district court ruled that, as a matter of Tennessee law, the plaintiff could not recover on this theory. Our reversal of the district court's holding on § 324A renders it unnecessary to address the correctness of the court's holding on the breach-of-contract argument.

of section 324A under Tennessee law, but granted summary judgment for the defendant nonetheless, holding that the plaintiff had not presented any facts that would justify applying section 324A. The plaintiff appeals that decision.

II.

National Loss contends that the district court erred in holding that section 324A provides a valid basis for recovery under Tennessee law. National Loss also contends that, if Tennessee law does recognize section 324A, the district court was correct in holding that Canipe's allegations do not implicate section 324A. Canipe argues that the court correctly held the principles underlying section 324A are cognizable in Tennessee, but that it incorrectly concluded that the plaintiff had not alleged facts sufficient to warrant recovery under section 324A. We agree with the plaintiff on

both parts of his argument.

A.

The district court's holding that section 324A states Tennessee law rested upon the decision of the Court of Appeals for the Sixth Circuit in Neal v. Bergland, 6 Cir. 1981, 646 F. 2d 1178, aff'd sub nom. Block v. Neal, 1983,——U.S.——, 103 S. Ct. 1089, 75 L. Ed. 2d 67. The plaintiff in Neal had bought a prefabricated home in Tennessee that had been inspected by an employee of the United States Farmers Home Administration. Although the inspector had noted no problems with the house, it later turned out to be defective. The plaintiff sued various federal officials in Tennessee state court, and the defendants removed the action to federal district court. The district court dismissed the complaint. The Court of Appeals reversed, holding that the plaintiff had stated a

a cause of action under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 et. seq. (1982). The Court's perceived basis for the plaintiff's potential recovery against the government was the principle "that one undertakes to act, even though gratuitously, is requited to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care." 646 F. 2d at 1181-82.[5]

5. The Court referred to § 323 of the Re-Statement (Second) of Torts (1965) as an expression of this principle. Section 323 states:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> "(a) his failure to exercise such care increases the risk of such harm, or
>
> "(b) the harm is suffered because of the other's reliance upon the undertaking."

Sections 323 and 324A are often cited together as expressions of the same basic principle. See, e.g., Blessing v. United States, E.D. Pa. 1978, 447 F. Supp. 1160, 1178 & N. 39, 1193; Restatement (Second) of Torts § 324A comment a (1965).

[1] We place little weight upon the Neal decision. The Court there did not state explicitly that it was applying Tennessee law, and it does not discuss any Tennessee cases.[6] Nonetheless, it is reasonably well recognized that the federal government is liable under the FTCA only if the applicable state law would place liability upon a private actor in like circumstances. See U.S.C. § 1345(b) (1982); id. § 2674; see also, e.g., United Scottish Insurance Co. v. United States, 9 Cir. 1980, 614 F. 2d 188, 193. We conclude, therefore, that the district court was correct in deciding that the Neal Court was "attempting

6. In reviewing the Neal decision, the Supreme Court noted this deficiency in the opinion of the Court of Appeals. See Block v. Neal, ——U.S. at——n. 3, 103 S. Ct. at 1092 n. 3, 75 L.Ed. 2d at 73 n. 3. Because the government had not appealed that part of the Court of Appeals' opinion, however, the Supreme Court did not evaluate its validity. See id. ——U.S. at ——, 103. S. Ct. at 1092, 75 L. Ed. 2d at 73.

to make an educated Erie guess" as to Tennessee law.

[2] Furthermore, our independent review of Tennessee case law convinces us that Tennessee has adopted the principle of section 324A. The leading decision is Johnson v. Orman Construction Co., Tenn. 1975, 519 S.W2d 782. In that case, the state had hired an independent contractor to construct an interstate highway. The plaintiffs' son was killed when he drove his car into a contruction barricade erected by the construction company. The plaintiffs alleged that the company was negligent in that it did not adequately mark the barricade so as to warn oncoming traffic. The trial court dismissed the suit, but the Tennessee Supreme Court reversed. In holding that the contractor could be liable for his negligence despite the existence of its contractual relationship with the state and

despite the state's inspection of the work in question several days before the accident, the supreme court reasoned:

> "In our opinion, if an independent contractor is guilty of negligence in performing his work in such a way that it could reasonably be forseen that the owner or third parties would probably sustain personal injuries or property damage as a result of the negligent condition, then the independent contractor should not, as a matter of law, be discharged merely because his work has been accepted and delivered to the owner."

519 S.W. 2d at 788. Two cases involving similar facts and reaching essentially the same holding are Broome v. Parkview, Inc., 1962, 49 Tenn. App. 725, 359 S.W. 2d 566, 568, and De Ark v. Nashville Stone Setting Corp., 1955, 38 Tenn. App. 678, 279 S.W. 2d 518, 521. See also Nidiffer v. Clinchfiled Railroad Co., Tenn. Ct. App. 1980, 600 S. W. 2d 242, holding that a volunteer who undertakes to act is " 'subject to the duty

of acting carefully, if he acts at all' ". Id. at 246 (quoting Glanzer v. Shepard, 1922, 233 N.Y. 236, 135 N.E. 275, 276).[7]

Although none of these cases refers to section 324A explicitly, they all embody the basic theory of liability underlying section 324A. And, we have found no state decision that runs counter to the principle

7. We consider it marginally relevant that five of Tennessee's sister states have adopted section 324A. See Gray v. Charles Beck Mach. Corp., S. D. Ga. 1980, 495 F. Supp. 250, 252 (citing Huggins v. Aetna Casulty & Sur. Co., 1980, 245 Ga. 248, 248, 264 S. E. 2d 191, 192); Glover v. Silent Hoist & Crane Co., N. D. Ala. 1979, 471 F. Supp. 457, 469-60 (discussing United States Fidelity & Guar. Co. v. Jones, Ala. 1978, 356 So. 2d 596, 597-98); Raymer v. United States, W. D. Ky. 1978, 455 F. Supp. 165, 167 (citing Haddad v. Louisville Gas & Elec. Co., Ky. 1970, 449 S. W. 2d 916); Fuller v. Aetna Casulty & Sur. Co., S. D. Miss. 1974, 369 F. Supp. 967, 968; Quail Hollow East v. Donald J. Scholz Co., 1980, 47 N.C. App. 518, 268 S. E. 2d 12, 15 review denied, 301 N.C. 527, 273 S. E. 2d 454.

of section 324A .[8] In Mosely v. United States. E. D. Tenn. 1978, 456 F. Supp. 671, the court addressed the liability of the federal government under the FTCA for the death of a mineworker. The plaintiff alleged that government inspectors were negligent in not detecting the dangerous condition that led to the accident causing the worker's death. The district court concluded that Tennessee had adopted sections 323 and 324A of the Restatement, and granted summary judgment for the government. We cannot give the Mosley decision much credence. In reaching its conclusion concerning sections 323 and 324A, the opinion does not discuss any Tennessee cases, let alone the ones

---

8. The same is true of Tennessee statutory law. See Tenn.Code Ann. § 29-34-104 (Michie 1980);

> "Privity not required. In all cases of injury for personal injury or property damage brought on account of negligence, strict liability or breach of warranty,...privity shall not be a requirement to maintain said action."

mentioned in the preceding paragraph. Nor does Mosley address State v. Clymer, 1943, 27 Tenn. App. 518, 182 S. W. 2d 425, an analogous case involving a mining accident and a lawsuit against state mine inspectors. In Clymer, the Tennessee court of appeals held that the inspectors could be liable to mineworkers killed or injured in an accident that could have been prevented had the inspectors performed their duties non-negligently. See id. 182 S. W. 2d at 429-31. We therefore reject the Mosley court's interpretation of Tennessee law.

We hold that the district court was correct to conclude that section 324A, in principle, provides a valid basis for recovery under Tennessee law. We affirm that part of the district court's decision.

B.

To recover under section 324A, a plain-

2.

A plaintiff seeking to recover under section 324A must demonstrate that the facts of his case come withone of the three subsections of section 324A. Therefore, to paraphrase section 324A, we cannot affirm the grant of summary judgment for the defendant in the present case unless the record shows that there is no genuine issue whether

(a) the defendant's failure to exercise reasonable care increased the risk of the injury suffered by the plaintiff, or

(b) the defendant undertook to perform a duty owed by Kraft to the plaintiff, or

(c) the plaintiff's injury resulted from reliance by Kraft or the plaintiff upon the defendant's undertaking.

We find the district court's holding on this point erroneous.

tiff must prove (1) that the defendant undertook to provide services for another that the defendant should recognize as necessary for the protection of the person or property of the plaintiff, (2) that the defendant performed its undertaking negligently, and that this negligence was the proximate cause of the plaintiff's injury, and (3) that the situation among the parties exemplifies one of the three subsections of section 324A. The parties do not dispute the applicability of the first element to the instant case. Summary judgment for the defendant was appropriate, therefore, only if the defendant established beyond genuine dispute that the facts of this case do not implicate the second and third elements. We find that National Loss has not carried this burden.

[3] To determine whether the record contains facts indicating that National Loss performed its undertaking negligently, it is first necessary to ascertain the scope of the undertaking, for the scope of the defendant's undertaking determines the scope of its duty. See Blessing v. United States, E. D. Pa. 1978, 447 F. Supp. 1160, 1189-90; Fireman's Fund American Insurance Co. v. Coleman, Ala. 1980, 394 So. 2d 334, 349 (Jones, J., concurring in the result); Evans v. Otis Elevator Co., 1961, 403 Pa. 13, 19, 168 A. 2d 573, 576. One of the parties' principal disputes on appeal concerns the scope of National Loss's undertaking. Canipe contends that National Loss contracted to inspect and evaluate work practices and procedures. He argues, therefore, that National Loss was negligent for not recognizing the unsafe nature of the cleaning procedure taught to the plain-

tiff. The district court held, and the defendant asserts on appeal, that the contract made the defendant responsible only for inspecting for physical hazards.

We find it unnecessary to resolve this dispute. Accepting the defendant's characterization of its contractural obligations, we find that the record contains facts that at least establish as a genuine issue whether the defendant performed these obligations negligently. The parties agree that National Loss was obligated to inspect for physical hazards, and that in September 1979 its agents were looking specifically for violations of OSHA regulations. Canipe has pointed to evidence by National Loss in its inspection for physical hazards and OSHA violations proximately caused his injury. First, the depositions of the two inspectors who conducted the September 1979 survey indicate clearly that they examined

the two flakes roll machines the plaintiff operated. Second, the plaintiff submitted an affidavit by Dr. Louis B. Trucks, an expert in safety engineering, listing a number of physical hazards in the flake rolle machines. Dr. Trucks found that the machines were inadequately guarded and did not contain adequate warnings, that the on-off switch was located on a different level and 30 feet away from the machines, and that the machines did not contain an emergency switch-off for workers who find themselves in peril. In Dr. Truck's opinion, some of these hazards constituted violations of OSHA regulations.[9] All of these facts

---

9. See generally 29 C.F.R. § 1910.212 (1983):

> "(a) Machine guarding-(1) Types of guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two hand tripping devices, electronic safety devices,

etc.
"(b) General requirements for machine guards. Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachments to the machine is not possible.

support the plaintiff's allegation of negligence on the part of the defendant.

Similarly, the record contains evidence that the alleged negligence was the proximate cause of the plaintiff's injury. Allen Jamison, the Kraft official in charge of coordinating safety policy at the Humko plant, stated in his deposition that Kraft would remedy any OSHA violations uncovered by the National Loss inspectors regardless whether the remedies were cost justified. It cannot be disputed that Canipe might not have been injured had National Loss detected, and Kraft remedied, the physical hazards that Dr. Trucks identified in the flake roll machines. There was, therefore, at least a genuine issue as to whether the defendant negligently performed its contractural undertaking and whether this negligence proximately caused the plaintiff's injury.

[4] The district court correctly determined that subsection (a) of section 324A does not apply to this case. This subsection requires some change in conditions that increases the risk of harm to the plaintiff over the level of risk that existed before the defendant became involved. See Stacy v. Aetna Casulty & Surety Co., 5 Cir. 1973, 484 F. 2d 289, 293 n. 4; Blessing v. United States, E.D. Pa. 1978, 447 F. Supp. 1160, 1197 n. 53. A failure to detect a hazardous condition does not by itself implicate subsection (a).

[5,6] The district court erred, however, by taking an unduly narrow approach to subsections (b) and (c). Implicit in the district court's treatment of subsection (b) is the assumption that this subsection applies only if Kraft had delegated entirely "the responsibility to provide its employees, including plaintiff, with a safe working

environment."[10] 566 F. Supp. at 527. Similarly, the district court's discussion of subsection (c) apparently assumes that Kraft's reliance on National Loss must have been wholesale-that is, preclusive of Kraft's undertaking any similar safety services itself-for subsection (c) to apply. See id. at 528.

Such a restrictive approach to subsections (b) and (c) is not supported by the relevant cases. Subsection (b) comes into play as long as the party who owes the plaintiff a duty of care has delegated to the defendant any particular part of that

10. The district court cited Overstreet v. Norman, 1957, 44 Tenn. App. 343, 314 S.W. 2d 47, for the proposition that, under Tennessee law, an employer cannot delegate its duty to provide a safe working place for its employees. We agree with the plaintiff that Overstreet is inapposite here. That decision establishes only that an employer cannot avoid liability by delegating its duty to another party; it does not create an immunity for other parties who contract to provide safety services.

duty.[11] See Davis v. Liberty Mutual Insurance Co., 5 Cir. 1976, 525 F. 2d 1204, 1208. In Hill v. James Walker Memorial Hospital, 4 Cir. 1969, 407 F. 2d 1036, for example, a hospital hired the Orkin Exterminating Company to rid the hospital of rats. The plaintiff, a patient at the hospital, suffered from a fall caused by her becoming frightened when a rat ran across her feet. In holding Orkin liable under section 324A (b) for the plaintiff's injury, the court reasoned:

> "It is clear that the defendant hospital was under a legal duty to exercise reasonale care in regard to the safety of its patients, and that under its contract with Orkin, the latter had undertaken to perform a certain

11. See also Tillman v. Travelers Indem. Co., 5 Cir. 1975, 506 F. 2d 917, 921; Stacy v. Aetna Casualty & Sur. Co., 5 Cir. 1973, 484 F. 2d 289, 294; Blessing v. United States, E. D. Pa. 1978, 447 F. Supp. 1160, 1193-94; Nelson v. Union Wire Rope Corp., 1964, 31 Ill. 2d 69, 199 N.E. 2d 769, 780; Evans v. Otis Elevator Co., 1961, 403 Pa. 13, 168 A. 2d 573.

> aspect of this duty in the hospital's behalf. The above-quoted section [324A(b)] squarely covers the instant case...."

407 F. 2d at 1042 (emphasis added).

The district court relied on language in Stacy v. Aetna Casulty & Surety Co., 5 Cir. 1973, 484 F. 2d 289, to the effect that a "systemwide assumption of [the employer's] duty to discover latent hazards", id, at 294, is prerequisite to the application of subsection (b). See 566 F. Supp. at 528. This reliance was misplaced. Of critical importance to the Court in Stacy was the fact that the defendant was not specifically obligated to inspect, and had not inspected, the room in which the plaintiff was injured.

> "Because no representative of Aetna, at any time prior to Stacy's accident, conducted an actual inspection of [the employer's] ice storage room or of the ice conveyor system, Stacy's case is immediately distinguishable from the situation where an inspecting workman's compensation carrier undertakes, but

> negligently performs, an inspection of the injury-producing instrumentality.
>
> "On the facts of the present case, [therefore,] Aetna's liability must find support in proof that it undertook an inspection program which obligated it to seek out and report safety defects anywher in [the employer's] processing facility...."

484 F. 2d at 293 (citations omitted; emphasis added). Stacy's reference to "system-wide assumption" of duty, therefore, is inapplicable to any situation in which the plaintiff's injury arises within the specifically defined scope of the defendant's undertaking. In such situations, liability under section 324A (b) may result if an employer has delegated any part of its duty to discover and remedy unsafe working conditions. See id. at 294.

[7] Similarly, an employer's partial reliance on the defendant's undertaking will suffice to trigger subsection (c). An employer need not forsake completely a par-

ticular aspect of its safety program. The reliance element of subsection (c) is satisfied if, in relying on the defendant's undertaking, the employer "neglect[s] or reduce[s]" its own safety program. Bussey v. Travelers Insurance Co., 5 Cir. 1981 (per curiam) (summary calendar), 643 F. 2d 1075, 1078.[12]

[8] The record in the present case contains evidence from which a jury could legitimately infer that Kraft delegated to National Loss its duty to identify OSHA violations at the Humko plant, and that Kraft relied on National Loss to identify OSHA violations at that plant. On July 5, 1979, Kraft's Corporate Safety Director, Jack Hansen, sent a memorandum to all of

12. Accord Tillman v. Travelers Indem. Co., 5 Cir. 1975, 506 F. 2d 917, 921; Stacy, 484 F. 2d at 295; Hill v. United States Fidelity & Guar. Co., 5 Cir. 1970, 428 F. 2d 112, 120; Heinrich v. Goodyear Tire and Rubbber Co., D. Md. 1982, 532 F. Supp. 1348, 1356; see Fireman's Fund Am. Ins. Co. v. Coleman, Ala. 1980, 394 So. 2d 334, 338-39.

Kraft's safety managers instructing them to ensure that there were no OSHA violations at Kraft plants. Five years later, Allen Jamison wrote to National Loss to request the simulated OSHA insepction.[13] These facts themselves imply delegation and reliance. In addition, Jamison stated in his deposition that Kraft had not itself inspected the Humko plant for OSHA violations,[14] and there is nothing in the record to show that the Humko plant kept any safety experts on its payroll.

The nature of the defendant's business and of its contractual relationship with Kraft is also significant. Many of the cases dealing with the section 324A involve

---

13. The report generated from this inspection states that "[t]he purpose of the survey was to identify problem areas requiring corrective action necessary to bring the operations into compliance with Federal Standards." Supp. Record, exh. P-4,at 1.

14. Deposition of Allen Jamison, at 57-58 (filed July 2, 1982).

the employer's workmen's compensation or liability carrier, who performed inspections to reduce the loss experience of its insured and accordingly to benefit itself by reducing the claims it had to pay. In the case before us the defendant is not an insurer at all. It is a company that holds itself out as an expert in safety services and that provides those services for a fee. Kraft hired the defendants specifically to find work hazards. These facts, in combination with those noted in the preceding paragraph, establish as a genuine dispute the applicability of section 324A (b) and (c). We must therefore reject the district court's conclusion to the contrary.

III.

We affirm the holding of the district court that the principles embodied in section 324A are valid law in Tennessee; we

reverse the holding that section 324A cannot apply to the facts indicated by the record. The defendant had not carried its burden of demonstrating the lack of any genuine issue of material fact concerning the applicability of section 324A. The record contains evidence that would support a jury finding that the denfendant performed its undertaking negligently, that such negligence proximately caused the plaintiff's injury, and that Kraft either (1) delegated to the defendant part of Kraft's duty to maintain a safe workplace, or (2) relied at least partly on the defendants to discover unsafe working conditions. The grant of summary judgment in favor of the defendant was erroneous.

The decision of the district court is AFFIRMED IN PART, REVERSED IN PART, and REMAMDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-4346

BILLY CANIPE,

Plaintiff-Appellant,

versus,

NATIONAL LOSS CONTROL SERVICE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

ON PETITION FOR REHEARING

(August 24, 1984)

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI DELTA DIVISION

BILLY CANIPE,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
NATIONAL LOSS CONTROL SERVICE CORPORATION,	)	NO. DC 81-192-WK-O
Defendant.	)	

MEMORANDUM OPINION

In this diversity action, plaintiff, Billy Canipe, a Tennessee citizen, sues National Loss Control Service Corporation (NATLSCO), an Illinois corporation qualified to do business in Mississippi, for personal injuries allegedly suffered as a result of NATLSCO's negligence and breach of contract. The court has

before it defendant's motion for summary judgment.[1]

Plaintiff was an employee of the Kraft-Humko plant in Memphis, Tennessee, where he was the operator of a machine known as a flake roll machine. As a part of his job duties, plaintiff was required to perform a clean out procedure on the flake roll machine that required him to lift a plastic dust cover and clean material from the machine's auger trough when converting from one product to another. This procedure required plaintiff to place his hand into the auger trough and, using an air hose, to blow the product down to the bottom of the trough. Plaintiff alleges that the procedure which he had been taught allowed him to clean the trough while the auger

---

1The court hereby withdraws its Memorandum Order of April 28, 1983, and substitutes this opinion in its place.

was in motion. On the date of his injury, the plaintiff was cleaning the auger trough when his shirt sleeve caught on a large pin on the end of the auger which pulled him into the auger trough. As a result of the injury, plaintiff's right arm was pulled off above the elbow and, although later reattached by surgeons, his arm remains basically useless at the present time.

Plaintiff relies upon two theories for recovery. First, plaintiff argues that he is entitled to recovery under the tort theory embodied in Section 324A of the RESTATEMENT (SECOND) OF TORTS. Second, plaintiff contends he is entitled to recovery under a third-party beneficiary contract theory. Moreover, plaintiff stoutly maintains that on either theory he has raised issues of fact which mandate

the denial of summary judgment to the defendant.

Before determining whether plaintiff is entitled to recovery under any theory, we must consider what state law applies to this action. Plaintiff argues that under the center of gravity rule, the contacts predominate in favor of application of Mississippi law. Defendant, however, argues that the law of Tennessee applies.

It is well settled that in federal diversity cases the choice of law is determined by conflict of law principles recognized by the forum state. Johnson v. Knight, 459 F. Supp. 962, 967 (N.D. Miss., 1978). Under the applicable Mississippi conflict of law principles, Tennessee law will apply to both a contract and tort theory of recovery. Under the tort theory, Tennessee law would apply since the alleged tortious acts and injury oc-

curred in Memphis, Tennessee. Browning v. Shackleford, 196 So.2d 365 (Miss., 1967). Under a contract theory, Tennessee law would also apply. Plaintiff was a resident of Tennessee at the time of his injury and the alleged contract was entered into and performed in Tennessee. The only relation this suit has to the State of Mississippi is that defendant is qualified and licensed to do business in the state and that plaintiff chose to file his lawsuit here. Therefore, the law of Tennessee will apply. See Johnson v. Knight, 459 F. Supp. 962, (N.D. Miss., 1978).

I. Recognition of Section 324A in Tennessee

Plaintiff's tort theory of recovery relies on Section 324A of the RESTATEMENT (SECOND) OF TORTS, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm; or
>
> (b) he has undertaken to perform a duty owed by the other to the third person; or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS, Section 324A. In Mosley v. United States, 456 F. Supp. 671 (E.D. Tenn., 1978), a federal district court, applying Tennessee law, stated:

> It does not appear that Tennessee has ever applied this rule [324A]; the plaintiff cited no authority reflecting the adoption by Tennessee of either of the foregoing versions of it, and this Court

> is aware of none. Where Tennessee law is applicable, as here, there can be no recovery under a legal theory which does not appear to exist in this state.

Id. at 675. Plaintiff relies, however, on Neal v. Bergland, 646 F. 2d 1178 (6th Cir. 1981), for its proposition that Section 324A would be applied by the Tennessee Supreme Court if it were presented with the issue.

The Neal litigation, originally filed in the Circuit Court of Roane County, Tennessee, was removed upon application of defendant Bergland, the then Secretary of Agriculture, to the United States District Court for the Eastern District of Tennessee. 646 F.2d at 1179. The suit was brought as a direct action against the Secretary of Agriculture asserting that Title V of the Housing Act of 1949, 42 U.S.C. Section 1471 et seq., and the regulations issued thereunder, 7 C.F.R. Sec-

tion 1802.71 et seq., create an obligation on the part of the Farmers Home Administration (FmHA) to supervise, inspect or warrant the construction of houses built with FmHA financing. Id. Holding that no such duty was created under the federal laws, the district court dismissed the federal defendants, and remanded the case to state court as to the nonfederal defendants. Neal v. Bergland, 489 F. Supp. 512, 516 (E.D. Tenn., 1980). On appeal, the Sixth Circuit reversed because of:

> the principle expressed in Section 323 of the Restatement (Second) of Torts (1965) that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care.

Neal v. Bergland, 646 F.2d. 1178, 1181-82 (6th Cir. 1981). Although we might be inclined to agree with the

conclusion reached in Cross Brothers Meat Packers vs. United States, 533 F. Supp. 1319 (E.D. Pa., 1982), that the Sixth Circuit in Neal was applying federal law rather than Tennessee state law, nevertheless the Supreme Court in Block v. Neal, ___ U.S. ___, 75 L. Ed.2d 67 (1983), appears to have indicated a contrary interpretation. The Court in Neal characterized the action as one falling under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), 2671-2680. Id. at 73. Because of this characterization, the Supreme Court assumed the Sixth Circuit was applying Tennessee law when discussing the Good Samaritan rule embodied in Section 323 of the Restatement,[2] stating in footnote three:

---

[2]Although the Court made this assumption, its decision was actually decided on other grounds. The question presented to the court in Neal was

> The Court of Appeals found that respondent stated a claim against the United States under the common law Good Samaritan doctrine which is described in Section 323 of the Restatement (Second) of Torts (1965). However, the court did not expressly find that Tennessee law recognizes this doctrine, see 28 U.S.C. Section 1346 (b), and would apply it to a private person responsible for similar negligence.

Id. at n.3. In view of the Supreme Court's interpretation, we must assume the Sixth Circuit was attempting to make an educated Erie guess of Tennessee state law in Neal. This being the case, the conflicting holdings of the district court in Mosley and the Sixth Circuit in Neal must be resolved in favor of the appellate court opinion. Indeed, if we were writing on a clean

---

[2] whether the claim was exempted by Section 323 of the Restatement (Second) of Torts (1965). However, the court did not expressly find that Tennessee law recognizes this doctrine, see 28 U.S.C.

slate, the progressive principles of Section 324A would be favored by us. Therefore, we hold that if the Tennessee Supreme Court were presented with the question, it would apply the Good Samaritan rule embodied in Section 323 and Section 324A of the RESTATEMENT (SECOND) OF TORTS. Because we so hold, we must now determine whether plaintiff has presented an issue of material fact under Section 324A requiring resolution by a jury.

II. Any Factual Issue(s)?

Section 324A of the RESTATEMENT (SECOND) OF TORTS states:

> one who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

> (a) his failure to exercise reasonable care increases the risk of such harm; or
>
> (b) he has undertaken to perform a duty owed by the other to the third person; or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. In order to present a factual issue to defeat the motion for summary judgment, plaintiff must submit, by affidavit, deposition or other discovery material, some evidence that defendant's actions fall into category (a), (b), or (c) of Section 324A. Viewing the evidence in the light most favorable to plaintiff, we are compelled to conclude no material factual question remains for the trier of fact.

A. The Obligation and Performance of NATLSCO

On November 9, 1978, Kraft, Inc. of Glenview, Illinois (Kraft), entered into an "Agreement for Services" with National Loss Control Service Corporation (NATLSCO). The agreement provided that NATLSCO would "provide Loss Control services on a request basis as approved and initiated by Kraft's Director of Safety and Security or other authorized employee." Though specifying the rate of compensation for any services rendered, the agreement made no mention of what services would actually be performed. Pursuant to discussions between NATLSCO and Kraft personnel, a service directive was issued by R. D. Mulder, NATLSCO's account coordinator, to the service representatives working on the Kraft account. The service directive also stated that auditing of programs,

physical inspections, etc. would be performed for Kraft on a request basis.

According to the deposition of Allen Jamison, Kraft's manager of Administrative Service for Industrial Foods Division, NATLSCO was requested to make quarterly physical hazard surveys and loss experience analyses at the plant in question. These services consisted of two basic functions: (1) analysis of previous accidents at the plant in order to determine loss patterns for concentrated study and (2) walk-through inspections to determine physical hazards by observing the physical layout and condition of the plant.

As explained by Jamison, loss analysis is retrospective. After injuries occur, the consultant attempts to determine the cause and its likelihood of recurrence. The walk-through

inspection is a proceeding of the inspectors through the general traffic patterns of the plant, observing any physical hazards that might be within a reasonable distance of the inspectors. These were the only types of services requested by Kraft for quarterly inspections. Kraft did not request NATLSCO to perform a job safety analysis of any employee position; neither did it request an inspection of the plant's operating practices or procedures. Jamison stated, in his deposition testimony, that only if an inspector fortuitously observed an unsafe practice or procedure would Kraft expect NATLSCO's inspector to investigate and bring the unsafe practice to the attention of Kraft's management in the form of a recommended change.

This understanding was held not only by Jamison, but by Jack Hansen, Kraft's corporate safety manager.

These two Kraft representatives testified consistently that NATLSCO was never called upon to perform a survey or inspection of operating practices or procedures involving equipment at the plant.[3] Since there had never before been an accident involving the flake roll machines, no loss experience analysis was performed as to them.

That NATLSCO was not requested to inspect Kraft's operating practices and procedures was confirmed by Russell Mulder, NATLSCO's account representa-

---

[3]While we are cognizant of the admonition in Rule 56 against granting summary judgment in suits in which a witness' credibility or veracity is at stake, we do not believe this is such a case. The depositions of Jamison, Hansen, Burger, Mulder, and Currie were taken at plaintiff's request. Throughout each deposition, the testimony was consistent. Although plaintiff's counsel attempted to elicit contradictory responses within each deposition, as well as among the five, the depositions taken as a whole evidence no inconsistencies and do not raise an issue of credibliity or veracity.

tive, John W. Burger and Martin B. Currie, both NATLSCO inspectors for the Kraft account. It was their uncontradicted testimony that NATLSCO inspectors did not, nor were they requested to, survey the plant safety practices and procedures. Again, it is undisputed that only if the inspector happened to observe an unsafe procedure would he be required to investigate and report the situation to Kraft.

In addition, the Loss Control Survey reports for December 12, 1978, April 4, 1979, and June 26, 1979, indicate that the actual performance of NATLSCO inspectors conformed to the common understanding of the purpose of the quarterly inspections. These reports state as each inspection's purpose the performance of a loss experience analysis and physical hazard survey. The results of the physical

hazard surveys reveal the inspectors were searching for unsafe conditions of the plant and equipment, rather than procedures used in operating the equipment. For example, the December 12, 1978, survey report listed poor housekeeping, cracked grinder guards, unsecured gas bottles, and one employee observed not wearing safety glasses. To the extent failure to wear safety glasses might be considered a practice or procedure, this notation indicates the scope of NATLSCO's duty. The "practice" of employees wearing safety glasses was not investigated on a plant-wide basis. Only where the unsafe practice of not wearing safety glasses was fortuitously observed by the NATLSCO inspector did he make such a notation and recommendation to Kraft. This is entirely consistent with the deposition testimony of both NATLSCO employees and disin-

terested Kraft personnel.

Only one inspection differed at all from those described above. On July 10, 1979, Kraft's Jamison wrote a letter to NATLSCO's Mulder requesting a change in the quarterly inspection process. Due to perceived changes in the Occupation Safety and Health Administration's (OSHA) position on defining "serious violations," Jamison requested NATLSCO to perform a simulated OSHA inspection. This pre-OSHA inspection was to be performed on a one-time basis during the third quarter of 1979. The specific purpose of this inspection, according to Jamison, was to have someone come in and play "the devil's advocate" for what needed to be done to pass an OSHA inspection. In this instance, however, the inspection was limited to physical hazards and only if an unsafe procedure was observed did Kraft expect NATLSCO to

comment on it.

The pre-OSHA inspection took five days and involved two NATLSCO inspectors - Burger and Currie. According to Jamison and Hansen, this inspection was limited to a search for physical conditions which would be considered serious violations of OSHA regulations. The deposition testimony of Currie and Burger substantiates this fact as does the September 1979 Loss Control survey report completed following the inspection. That report deals exclusively with physical conditions observed by Burger and Currie and considered in violation of OSHA regulations.

Because it is uncontradicted that the sole purpose of the September pre-OSHA inspection was to identify physical hazards that violated OSHA regulations, an overview of those regulations is helpful. Pursuant to Section

6(a) of the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1593, the Secretary of Labor promulgated occupational safety and health regulations which, at the time relevant to this suit, were codified in 29 C.F.R. Section 1910. Subpart 0 of Section 1910, entitled "Machinery and Machine Guarding," deals exclusively with physical conditions of machinery, not practices or procedures related thereto. Although this subpart most directly relates to the accident in question, various other regulations within 29 C.F.R. Section 1910 were utilized by NATLSCO to simulate the OSHA inspection. See, e.g., 29 C.F.R. Section 1910.23 (guarding floor and wall openings and holes); 29 C.F.R. Section 1910.25 (portable wood ladders); 29 C.F.R. Section 1910.27 (fixed ladders); 29 C.F.R. Section 1910.37 (means of egress); 29 C.F.R.

Section 1910.309 (national electric code); 29 C.F.R. Section 1910.134(d) (air quality); 29 C.F.R. Section 1910.151(c) (eye washing facilities). Each of these regulations pertain, as do OSHA standards generally, to physical conditions, not operating procedures.

Because of this uncontradicted testimony, we conclude there is no question as to NATLSCO's obligation and performance as it relates to the case sub judice. NATLSCO was requested to and did perform loss experience analyses and physical hazard surveys during 1979. No requests were made for practice or procedure surveys.

B. Application of Uncontradicted Facts to Section 324A

Subparagraph (a) of Section 324A, RESTATEMENT (SECOND) OF TORTS would

subject NATLSCO to liability if its failure to exercise reasonable care increases the risk of such harm." Although plaintiff nominally alleges NATLSCO's failure to indentify a potential hazard in the procedure used to clean the flake roll machine increased the risk of harm to plaintiff, this court is unpersuaded. To avail himself to this provision of Section 324A, plaintiff must show some affirmative action by defendant such as recommending the hazardous procedure. Plaintiff has not even attempted such a showing. Mere negligence in failing to discover a danger, even if proved, would not subject NATLSCO to liability under Section 324A(a).

Under subparagraph (b), however, mere negligence can subject a defendant to liability. That section would make NATLSCO liable for plaintiff's injuries if it had "undertaken to per-

form a duty owed by the other to the third person," and was negligent in the performance of such duty. Plaintiff alleges NATLSCO undertook to perform Kraft's duty to provide a safe work environment and was negligent in such performance, yet we find this contention unavailing. Through the uncontradicted depositions of Kraft's Hansen and Jamison, as well as NATLSCO's Burger, Currie and Mulder, NATLSCO proved that Kraft, as the employer, did not relinquish, nor did NATLSCO assume, the responsibility to provide its employees, including plaintiff, with a safe work environment. NATLSCO's activities were limited to inspections of physical conditions, not operating procedures. We emphasize that plaintiff presented no affidavit or other evidentiary material to rebut this evidence. For this reason, it is clear NATLSCO did

not undertake to assume or take over Kraft's duty. Indeed, under Tennessee law, Kraft's duty to provide to employees, including plaintiff, with safe working conditions was non-delegable. Overstreet v. Norman, 314 S.W.2d 47 (Tenn. App. 1957). At most, NATLSCO's inspections, made on Kraft's request, merely parralleled the ongoing independent safety inspections of Kraft. As Jamison stated in his deposition, Kraft used NATLSCO's recommendations as a doctor's second opinion, and this does not impose Section 324A (b) liability. See Hill v. James Walker Memorial Hospital, 402 F.2d 1036, 1042 (4th Circuit 1979) (actions paralleling those of obligor and not in substitution therefor, will not subject actor to Section 324A liability); Blessing v. United States, 447 F. Supp. 1160, 1195 (E.D. Pa. 1978) (same).

In this respect, the basic facts in the instant case are similar to those in Stacy v. Aetna Casualty & Surety Co., 484 F.2d 289 (5th Cir. 1973). There Aetna conducted periodic inspections of the employer's facility pursuant to Aetna's workmen's compensation insurance policy with Purnell, the employer. The court of appeals held that there was no evidence that the employer delegated to Aetna, either by contract or course of conduct, any part of its direct and primary duty to discover unsafe conditions, and therefore, the case should not have been presented to the jury. Id. at 294. As the court stated in Stacy, "[p]roof that the insurer assisted [the employer] in those particular areas of its operation where the company felt it needed outside advice and recommendations falls far

short of systemwide assumption of [the employer's] duty to discover latent hazards." Id. Here, as in Stacy, the employer directed the outside consultant to inspect a certain part of its operation. In Stacy the employer did not request inspection of a particular area of the plant where an employee was subsequently injured. Id. at n.5. In the case sub judice, Kraft did not request, nor did NATLSCO perform, an inspection or survey of practices or procedures anywhere in the plant. The legal result is the same: plaintiff failed to place in issue the question of the outside consultant's assumption of the employer's duty to discover latent hazards. Therefore, NATLSCO may not be held liable under subparagraph (b) of Section 324A.

Similarly, the court finds plaintiff failed to place at issue either Kraft's or plaintiff's reliance on

NATLSCO's undertaking. Subparagraph (c) to Section 324A would subject NATLSCO to liability if "the harm is suffered because of reliance of the other or the third person upon the undertaking." As noted above, Kraft did not expect NATLSCO to perform inspections or surveys of its practices and procedures, and therefore, could not have relied on NATLSCO to do so. The undisputed proof shows that NATLSCO was instructed by Kraft to inspect only physical conditions. In addition, Jamison and Hansen testified that even NATLSCO's recommendations concerning physical conditions were advisory only, and there was no reliance by Kraft. There is no proof in this case of actual reliance on NATLSCO's inspections as required in Stacy. 484 F.2d at 295. Nor has plaintiff presented any evidence, by affidavit or otherwise, that he relied

on NATLSCO's inspections in his performance of cleaning procedures. Therefore, no question of fact is presented under Section 324A(c). Id.

In summary, plaintiff wholly failed to present evidence which would place NATLSCO's liability under Section 324A of the RESTATEMENT (SECOND) OF TORTS at issue. There is no proof that NATLSCO contracted or undertook to conduct inspections of practices or procedures or that previous accidents on the flake machine would have called the cleaning procedures to its attention. Accordingly, NATLSCO cannot be held liable under Section 324A. Id. at 675.

III. Third Party Beneficiary Theory

In his memorandum briefs, plaintiff makes an oblique reference to reliance on a breach of contract theory for recovery. Although plaintiff

makes no express mention of such a theory in his complaint, even under plaintiff's version of the facts, such a theory would be unavailing. Because plaintiff was not a party to the contract between Kraft and NATLSCO, the only conceivable theory upon which plaintiff could rely would be that of a third-party beneficiary to the contract. Tennessee has long recognized the doctrine that:

> The beneficiary, though not a party to the contract, may maintain an action directly in his own name against the promisor, for such promise upon sufficient consideration for the benefit of the third party.

Eidson v. Hardware Mutual Casualty Company, 191 Tenn. 430, 439, 234 S.W.2d 836, 840 (1950). However, Tennessee also recognizes the rule that "an incidental beneficiary acquires no rights against the promisor or the

promisee by virtue of the contract." Willard v. Claborn, 419 S.W.2d 168, 1970 (Tenn. 1967). In determining what constitutes an incidental beneficiary, the Tennessee courts have held that the intent of the parties as expressed by the plain language of the contract controls. See, e.g., Willard v. Claborn, 419 S.W.2d 168, 1970 (Tenn. 1967) (terms of contract must indicate intent to benefit third person); Rutherford County v. City of Murfreesboro, 304 S.W.2d 635 (Tenn. 1957) (third party beneficiary status determined by intent of parties as matter of construction of contract); E. O. Bailey & Company v. Union Planters Title Guaranty Company, 232 S.W.2d 309 (Tenn. App. 1949) (controlling intention is that expressed by language of contract). As stated by the Tennessee Supreme Court in Willard, "the

terms of the contract itself or the circumstances surrounding its execution [must] clearly indicate the contract was intended to operate for the benefit of some third person." Id. at 170. In the case sub judice, nothing appears in the contract between Kraft and NATLSCO or in the circumstances surrounding its execution to indicate that the contract was entered into to operate for the benefit of the plaintiff. Nor has the plaintiff presented us with evidence to the contrary. The contract was entered into for the benefit of Kraft which was to receive loss control services and help in passing a Tennessee OSHA inspection. The fact that Kraft's employees benefited from the safer work environment was merely incidental to the main purpose of the contract. Therefore, even if plaintiff had alleged a breach of contract by NATLSCO in his complaint,

plaintiff was merely an incidental beneficiary of the contract and as such obtained no rights against NATLSCO.

Being convinced that no genuine issue of material fact has been presented by plaintiff and as a matter of law, the court sustains defendant's motion for summary judgment.

Let an order issue accordingly.

This 27th day of May, 1983.

/s/ William C. Keady
United States District Judge